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Public Prosecutor v Tan Kim Piow

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO N–05–18 OF 1999

B GOPAL SRI RAM, RICHARD MALANJUM AND NIK HASHIM JJCA

13 JULY 2006

Criminal Law — Dangerous drugs — Trafficking in dangerous drugs — Possession — Custody and control of dangerous drugs — Whether appellant had exclusive occupation of room in which the dangerous drugs were found — Two other males were in the room — Dangerous Drugs Act 1952 s 39B

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Criminal Procedure — Trial — Prosecution's case — Failure to cross examine the two male Chinese on the issue of exclusive occupation of the room — Dangerous Drugs Act 1952 s 39B

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Evidence — Circumstantial evidence — Nature of — Accused's attempt to slam the door on the police and flee the scene — Whether conduct of the accused to be taken together with all the other circumstances of the case — Evidence Act 1950 s 8

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F The accused/respondent was charged for trafficking 442.9g of cannabis, an offence under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). On 30 June 1997, the accused's premise was raided by the police. The accused attempted to slam the door on the police and flee the scene but was apprehended. There were three beds in the room on the first floor. Two male Chinese were sprawled, one on each of two beds. They appeared to be asleep. The third bed was empty. They were startled when the police woke them. The drugs were recovered from the cupboard in which clothes that fit the accused were also recovered. On the floor of the room in question was found a registration card and insurance cover note for a motorcycle. Both documents bore the accused's name. The accused had the keys to the room in which the drug was found. The accused was the first person to whom the room in question had ever been let. The two male Chinese gave evidence that they were mere visitors and had nothing to do with the drug that was found in the cupboard. Neither witness was cross examined on the point. Indeed, it was not put to either of them that the drug belonged to the one or the other. The accused was acquitted at the close of the case for the prosecution. The public prosecutor appealed against the acquittal.

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Held, allowing the appeal:

(1) The failure to cross examine the two male Chinese is fatal to the defence on the issue of exclusive occupation of the room by the accused. In short, there was no material on which any inference in the accused's favour could be drawn

so as to create a reasonable doubt on the issue of occupancy of the room. It follows that prima facie the accused was the sole occupier of the room in which the drug was found (see para 5); *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29 referred.

(2) The accused's conduct in attempting to slam the door on the police and flee the scene is relevant and admissible by virtue of s 8 of the Evidence Act 1950. Although in a number of cases it has been said that absconding from the scene is not of itself evidence of guilt. In the present case, the conduct of the accused is not to be taken in isolation but together with all the other circumstances of the case. This is the correct approach to circumstantial evidence (see paras 6–7).

(3) The facts proved in the present instance lead to the irresistible inference that the accused was aware of his possession; he knew the nature of the drug he possessed and he had the power of disposal over it. In other words, the accused had mens rea possession. The prosecution having made out a prima facie case, it is for the accused to give a plausible explanation that would rebut the irresistible inference raised against him and thereby create a reasonable doubt in the mind of the court as to whether he had mens rea possession (see paras 11–12).

[Bahasa Malaysia summary

Tertuduh/responden dituduh dengan pengedaran 442.9g kanabis, satu kesalahan di bawah s 39B(1) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Pada 30 Jun 1997, premis tertuduh diserbu oleh pihak polis. Tertuduh telah cuba menghempas pintu ketika diserbu dan melarikan diri tetapi ditangkap oleh polis. Terdapat tiga katil di sebuah bilik ditingkat satu. Dua lelaki Cina masing-masing berbaring di atas katil pertama dan kedua tersebut. Mereka nampaknya sedang tidur. Katil ketiga kosong. Mereka terkejut apabila dijagakan oleh polis. Dadah tersebut diambil daripada almari di mana baju-baju yang padan dengan tertuduh juga diambil. Di lantai bilik dijumpai kad berdaftar dan nota perlindungan insuran untuk satu motorsikal. Kedua-dua dokumen mengandungi nama tertuduh. Tertuduh mempunyai kunci ke bilik di mana dadah itu dijumpai. Tertuduh merupakan orang yang pertama di mana bilik tersebut disewakan. Kedua-dua lelaki Cina memberikan keterangan bahawa mereka hanya pelawat dan tidak ada berkaitan dengan dadah yang dijumpai di dalam almari. Kedua-dua saksi tidak disoal balas berhubung dengan isu ini. Ia juga tidak diletakkan kepada mereka bahawa dadah itu kepunyaan salah satu daripada mereka. Tertuduh dibebaskan selepas penutupan kes pendakwaan. Pendakwa raya merayu terhadap pembebasan perayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Kegagalan menyoal balas dua lelaki Cina membawa mudarat kepada pembelaan atas isu penghunian yang esklusif ke atas bilik tersebut oleh tertuduh. Pendek kata, tiada bahan dimana sebarang inferens yang memihak tertuduh dapat diperoleh bagi tujuan mewujudkan keraguan munasabah atas isu penghunian bilik tersebut. Lanjutan dari itu tertuduh prima facie

merupakan penghuni tunggal bilik tersebut dimana dadah dijumpai (lihat perenggan 5); *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29 dirujuk.

(2) Tingkahlaku tertuduh cuba menghempas pintu ketika diserbu dan melarikan diri adalah relevan dan diterima menurut s 8 Akta Keterangan 1950, walaupun dalam beberapa kes, ia dikatakan bahawa melarikan diri dari tempat kejadian dengan sendirinya bukan bukti kesalahan. Dalam kes ini, tingkahlaku tertuduh tidak boleh diambil secara berasingan tetapi bersama dengan lain-lain keadaan kes tersebut. Ini merupakan pendekatan yang betul untuk keterangan ikut keadaan (lihat perenggan 6–7).

(3) Fakta-fakta yang dibukti dalam kes ini membawa kepada inferens yang tidak dapat dibendung bahawa tertuduh mempunyai pengetahuan akan milikannya; bahawa dia tahu akan sifat dadah yang dimiliknya dan dia mempunyai kuasa untuk mengendalikan dadah tersebut. Dalam kata lain tertuduh mempunyai mens rea milikan. Pendakwaan telah membentuk satu kes prima facie, ia adalah untuk tertuduh memberikan satu alasan yang dapat mematahkan inferens yang tidak dapat dibendung terhadapnya dan dengan itu mewujudkan keraguan munasabah diminda mahkamah samada dia mempunyai mens rea milikan (lihat perenggan 11–12).]

Notes

For cases on trafficking in dangerous drugs, see 4 *Mallal's Digest* (4th Ed, 2003 Reissue) paras 121–123.

For cases on trial on prosecution's case, see 4 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4574–4583.

For cases on nature of circumstantial evidence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) 597–598.

Cases referred to

Chan Chwen Kong v PP [1962] MLJ 307 (refd)

Choo Yoke Choy v PP [1992] 2 MLJ 632 (refd)

Chua Beow Huat v PP [1970] 2 MLJ 29 (refd)

Mohamad Yazri Minhat v PP [2003] 2 MLJ 241 (refd)

Om Prakash Bakshi v State [1989] Cr LJ 1207 (refd)

Ong Ah Chuan v PP [1981] 1 MLJ 64 (refd)

Saad Ibrahim v PP [1968] 1 MLJ 158 (refd)

Tay Kah Tiang v PP [2001] 2 SLR 305 (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39A(2), 39B(1)

K Mangai (Attorney General Chambers) for the prosecution.

Dato' Muhammad Shafee Abdullah (Kaushalya Rajathurai, Lalitha Nagamuthu, Sarah Abishegam and Badrul Munir Bukhari with him) (Shafee & Co) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] The accused (for that is how we will refer to the respondent) was charged for trafficking 442.9g of cannabis, an offence under s 39B(1) of the Dangerous Drugs Act ('the Act'). He was acquitted at the close of the prosecution's case. The public prosecutor appealed against the acquittal. At the close of arguments, we allowed the appeal and remitted the case to the High Court with a direction to call upon the accused to make his defence on the amended charge of possession under s 6 read with s 39A(2) of the act. Our reasons now follow.

FACTS

[2] On 30 June 1997, at about 12.15 pm, PW10 (Inspector Yusof Abdul) acting on information received by him raided the first floor of premises No 303 Jalan Seng Meng Lee in Seremban. He was accompanied by a team of six other police personnel. He knocked on the door. It was opened by the accused. PW10 then identified himself as a police officer. At that point, the accused made a sudden attempt to close the door. Nevertheless, PW10 and his team managed to force their way in. The accused then tried to run into the house. But he was apprehended. The accused then led PW10 to a room on the first floor. There were three beds in that room. Two male Chinese were sprawled, one on each of two beds. They appeared to be asleep. The third bed was empty. PW10 woke them. They were startled.

[3] There was a cupboard in the room. In the cupboard there was a black plastic bag and inside it was a red plastic bag. From this PW10 removed a package which contained a substance that he suspected to be a dangerous drug. The substance he recovered was, upon subsequent chemical examination, found to be 442.9g of cannabis. The accused and the other two occupants (PW5 and PW6) were arrested. PW5 and PW6 were released and later gave evidence at the accused's trial.

[4] In our judgment, the learned judge overlooked the totality of the circumstantial evidence that was led before him by the prosecution. It is for this reason that he erred in acquitting the accused at the close of the prosecution's case. There were, in our view, sufficient facts established by the prosecution based on which a case of passive possession against the accused could *prima facie* be inferred.

[5] First, the drugs were recovered from the cupboard in which clothes that fit the accused were also recovered. Second, on the floor of the room in question was found a registration card and insurance cover note for a motorcycle. Both documents bore the accused's name. Third, the accused had the keys to the room in which the drug was found. Fourth, the accused was the first person to whom the room in question had ever been let. Fifth, PW5 and PW6 gave evidence that they were mere visitors and had nothing to do with the drug that was found in the cupboard. Neither witness was cross examined on the point. Indeed, it was not put to either of them that the drug belonged to the one or the other. This failure is fatal to the defence on the issue of exclusive occupation of the room by the accused (see *Chua Beow Huat v Public Prosecutor* [1970] 2 MLJ 29. In short there was no material on which any inference

A in the accused's favour could be drawn so as to create a reasonable doubt on the issue of occupancy of the room. It follows that *prima facie* the accused was the sole occupier of the room in which the drug was found. Sixth, there is the accused's conduct when confronted by PW10. His first reaction was to slam the door on the police. His second was to flee the scene.

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[6] This contemporaneous conduct of the accused is relevant and admissible by virtue of s 8 of the Evidence Act 1950. We are aware that in a number of cases it has been said that absconding from the scene is not of itself evidence of guilt. But if you look carefully enough at those cases, you will find that the only real evidence against the accused there was his flight. So you find the editors of *Sarkar's Law of Evidence* (15th Ed) saying this:

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> Mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. The act is a relevant piece of evidence to be considered along with other evidence but its value would depend upon the circumstances of each case.

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[7] In the present case, the conduct of the accused is not to be taken in isolation but together with all the other circumstances of the case. This is the correct approach to circumstantial evidence. As Thomson CJ said in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307

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> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

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[8] We find the facts of the present case to be much stronger than those of *Om Parkash Bakshi v State* [1989] Cr L J 1207. There, some policemen on their beat saw the petitioner and his co-accused arguing about a book. Each was snatching it from the other. When the accused were confronted by the police they became nonplussed. The book was found to contain 110g of morphine. The petitioner moved the High Court at Delhi to revise the order of the sessions court to frame a charge under the Narcotic Drugs and Psychotropic Substances Act read with s 120B of the Indian Penal Code. In dismissing the petition PK Bahri J said that the facts showed that

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> both the accused were in possession of the book containing the morphine and both were nonplussed when confronted by the police. So, from this circumstance a prima facie view can be taken that both the co-accused were having the knowledge that the book contained the morphine.

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[9] We now turn to two arguments addressed to us by the deputy who argued this appeal. In support of the appeal, she referred us to the presumption under s 37(g) of the act which she said may be invoked in this case. That section reads as follows:

(g) if any dangerous drug is found to be concealed in any premises, it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the occupier of the premises.

[10] We find it unnecessary to deal with this argument. In our judgment, independent of any presumption there is sufficient evidence led by the prosecution from which a strong inference that the accused had knowledge of the drug and that it was in his exclusive physical possession may be drawn. And exclusive possession is a *sine qua non* in a case of this nature (see *Choo Yoke Choy v Public Prosecutor* [1992] 2 MLJ 632).

[11] At the risk of repetition, we would observe that the facts proved in the present instance lead to the irresistible inference that the accused was aware of his possession; he knew the nature of the drug he possessed and he had the power of disposal over it. In other words, the accused had *mens rea* possession (see *Saad Ibrahim v Public Prosecutor* [1968] 1 MLJ 158). We would here emphasize that knowledge like other states of mind is a fact that is to be inferred from surrounding circumstances (see *Wong Lam Noi v Public Prosecutor* [1997] 3 MLJ 795 and *Tay Kah Tiang v Public Prosecutor* [2001] 2 SLR 305).

[12] The prosecution having made out a *prima facie* case, it is for the accused to give a plausible explanation that would rebut the irresistible inference raised against him and thereby create a reasonable doubt in the mind of the court as to whether he had *mens rea* possession.

[13] The learned deputy also made a rather diffident second submission that we should remit this case for defence to be called on the original charge of trafficking. However, under pressure of argument she quite rightly retreated from the position she originally took. We must make it abundantly clear that taking the prosecution's case at its highest does not even remotely support the charge of trafficking. For, all that was proved here were the elements of passive *mens rea* possession. To constitute trafficking under s 39B(1) of the Act, there must be *mens rea* possession accompanied by some overt act: mere passive possession is insufficient (see *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64; *Mohamad Yazri Minhat v Public Prosecutor* [2003] 2 MLJ 241).

[14] For the reasons already given, we allowed the appeal and made the appropriate orders.

Appeal allowed.

Reported by Sally Kee